

The Central Law Journal.

ST. LOUIS, MAY 1, 1885.

CURRENT EVENTS.

INTERESTING.—The "Current Topics" of the *Albany Law Journal* for April 18, are very interesting. The *Albany* joins hands with us in our attempt to elevate the legal profession, and in our plain denunciation of traffic in litigation. It also agrees with us in our views concerning the propriety of abolishing statutes, wherever they exist, which make certain religious beliefs a test of the qualification of witnesses. It even thinks that the adjectives which we applied to grand old, poor old Massachusetts, though "rather rough," were perhaps "deserved." The policy of the law should be so to frame the rules of evidence as to elicit information concerning the facts in issue from every attainable source; and, assuming what we deny, that a want of religious conviction implies a want of veracity, the fact should only go to the credibility of the witness, and not to his competency. Nothing but the *odium theologicum*, the rancor and hatred of religious bigotry, which is the most unworthy and uncharitable principle of human nature, could have dictated the vote in the Massachusetts legislature, to which we referred.

OUR DEVOTED HEAD.—All people have their troubles, but we sometimes think that editors have more than fall to the lot of ordinary mortals. Judges are habitually "honored;" lawyers who daily face each other in court, treat each other with habitual and studied urbanity; and if a hasty word is passed, it seldom fails to be followed by the *amende honorable*. But let the poor editor, in the zeal of his honest soul, unburden himself of a few outspoken thoughts, and sundry vials of wrath are sure to be opened upon his devoted head. We said vials; but some of them are bottles, jugs, barrels, reservoirs. The other day we unbosomed ourself concerning the conduct of two gentlemen of historical reputation, who have descended to the business of running a lottery, which business

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in Missouri, is a felony. We received from an unexpected source a curious letter, charging us with intentional falsehood, intimating that we were not gentlemen, accusing us of doing great injustice to "representative men," and commanding us to stop the paper. The paper, our readers perceive, is not stopped; and we retain sufficient courage to protest against the assertion that those who assist in the management of a lottery are, in any sense of the word, "representative men." They may have been, and, indeed, were representative men before they went into that business; but in that business they do not represent honest people of any section of the country, of any shade of opinion, or of any condition in life. They represent nobody but the lottery and themselves. Then we ventured a judicious observation or two on the subject of life insurance, and immediately thereafter we received an anonymous letter, written on the letter-head of an agent of a life insurance company, in a city of the far North, accusing us of having "worms," of suffering from a "loathsome disease," and of being a "narrow-minded rebel fraud and traitor." As we had just before been taken to task for improperly making use of the word "confederate,"¹ we really wondered if we had undergone the sudden transformation above indicated. Then our office boy and the printer's devil—as we stoutly insist—got up a conspiracy against our peace, by slipping into our interesting department of "Jet-sam and Flotsam," a squib about a certain general who, on a certain historical occasion, failed to get his division into action as soon as his comrades, who were being killed and run over, thought he ought to have done. This provoked a perfect deluge of war literature, and we were forced, out of pride of individual opinion, to sharpen our Faber and enter upon a vigorous defense of the irrelevant assertion which these young conspirators had made for us.

We thought that the storm had blown over, and determined to make no more complaints in our editorial columns about anything, but to write funny things, or to discuss general topics like the weather; when we received a caustic letter from an esteemed subscriber in Missouri commanding us to stop the paper

¹ Ante p. 277.

because of two things: 1. Our opposition to champerty. 2. Our attack upon the Bible. This really hurt our feelings. We confess to being opposed to champerty, but we have never spoken disrespectfully of the Holy Scriptures. In fact it was from a story told in the Divine Book, of the soldiers casting lots for the garments of our Savior, that we imbibed our antipathy to champerty. We do plead, with what we flatter ourselves is a generous passion, for the abrogation of those laws which prevent infidels from testifying in the courts of justice; because we have known men of that sort who would tell the truth; but this not only for their sakes, but also out of regard for the fact that Christians may sometimes suffer loss through a deprivation of their testimony. But with the question of the propriety of their belief or want of belief, we as a law journal have no concern.

We forgot to mention that a Cincinnati lawyer who was lately a candidate for disbarment, and was not elected, conceiving that our remarks upon his case were not sufficiently judicial in their tone, tendered his resignation as a member of our great family of edified and interested readers. No doubt our Albany brother could tell a similar tale of harrowing experiences. Verily, the lot of the honest editor is a hard one. He may apply to himself the observations supposed to have been uttered by a distinguished spiritual personage whose name inspires more fear than reverence:

"Me miserable, which way shall I fly,
Infinite wrath and infinite despair?
Which way I fly is hell; myself am hell;
And in the lowest deep a lower deep
Still threatening to devour me opens wide,
To which the hell I suffer seems a heaven."

VALUE OF SPECIAL DEMURRERS.—The modern American codes of practice require all demurrers to be special demurrers. Thus the Missouri Code recites: "The demurrer should distinctly specify the grounds of objection to the pleading; unless it does so, it may be disregarded." When the grounds of demurrer are so specified, the court will not take notice of other defects in the pleading demurred to, especially when the pleading

can probably be amended so as to make a case and avoid the defect.² The word "may" in the above statute is held to mean "should," and the court will look only to the objections specified.³ This is all very well at first blush; but the foresight of those who framed the above section did not reach so far as to tell us in what manner it could be applied in drawing a demurrer to a petition which is utterly barren of any constitutive facts—whose emptiness is of such an absolute character as to baffle all attempts to point out in which corner it is empty. This idea impressed the lively imagination of the late Roswell M. Field, who, by the way, was perhaps the brightest lawyer that ever practiced at the St. Louis bar, and whose genius has been inherited by his son, Eugene Field, the poet-journalist of the *Chicago News*. "How will you," said he, "specify the grounds of demurrer to such a petition as this: 'The plaintiff states that he, plaintiff, is a just man in the sight of God, and that the defendant is a worthless scoundrel; wherefore the plaintiff prays judgment in the sum of \$10,000?'"

NOTES OF RECENT DECISIONS.

EVIDENCE — PROOF OF HANDWRITING BY COMPARISON WITH A LETTER-PRESS COPY.—The danger of attempting to prove or disprove handwriting by comparing the disputed instrument with specimens of the handwriting of the party admitted to be genuine, is well known. Experts in handwriting are permitted to make such comparisons; judges frequently do it when sitting as triers of the facts; but it is generally regarded as error to submit papers to a jury for the purpose of having them make such comparisons.⁴ But to allow even an expert to testify as to the genuineness of handwriting after comparing the disputed instrument with a letter-press copy of a letter admitted to have been written by the party, would seem to be carrying the rule beyond the limits of safety.] So the Supreme Court of Cal-

² *Alnutt v. Leper*, 48 Mo. 319.

³ *McClurg v. Phillips*, 49 Mo. 315. See also *Young v. Wells*, 33 Mo. 106; *Loomis v. Tift*, 16 Barb. 541.

⁴ See Mr. Lawson's article on Proof of Handwriting by Comparison, *Am. Law, Rev. Aug. 1882, and Jan., Feb., 1883.*

ifornia recently held in the case of *Spottiswood v. Weir*,⁵ Ross, J., in giving the opinion of the court, said: "It is quite clear that the press copy of the letter was inadmissible until the non-production of the original was properly accounted for. But further than this, an expert witness was given specimens of Chambers' handwriting, and was permitted to compare them with the press copy of the letter alleged to have been written by him to Mrs. Weir, and to give his opinion as to the genuineness of the original of the copy. This was not permissible under any rule with which we are acquainted. It is essential that the document whose genuineness is sought to be proved should itself be produced. When the disputed writing is produced, evidence resulting from a comparison of it with other proved or admitted writings is not regarded as evidence of the most satisfactory character, and by some courts is entirely excluded. It would be adding vastly to the danger of such evidence to permit evidence to be given from a comparison of genuine writings with a press copy of the writing whose genuineness is disputed. Indeed, in this very case, the expert, on cross-examination, testified that 'it would be very dangerous to decide on a press copy for sure.'"

INCONSISTENT INSTRUCTIONS.—In *Baxter v. Lockett*,⁶ the court quote with approval the following rule under this head given in a well known work: "The giving of inconsistent instructions is error, for the reason that the jury will be as likely to follow the one as the other. Therefore, an erroneous instruction is not cured by another instruction on the same subject which is correct, unless the former is by the latter specifically withdrawn. And this is especially true of a correct general instruction, coupled with an erroneous specific instruction. The latter is obviously not cured by the former."⁷

ADOPTING PARENT CANNOT INHERIT FROM

ADOPTED CHILD.—In *Com. v. Powel*,⁸ the interesting point is ruled by the Pennsylvania Court of Common Pleas that an adopting parent cannot inherit from an adopted child under the laws of Pennsylvania, although an adopted child can inherit from an adopting parent equally with children by nature. In giving the judgment of the court upon this point, Boyer, P. J., used the following language: "The adopted child can inherit equally with children by nature from the adopting parent, because the law expressly so declares; and provides, also, that 'if such adopting parent shall have other children, he, she or they shall respectively inherit from and through each other, as if all had been lawful children of the same parent.' Yet it has been held that such adopted child cannot take under a devise to the 'children' of the parent by adoption; for it is not a child by nature."⁹ Neither can the parent by adoption inherit from the adopted child, for the act does not so declare; whilst it does in express words confer the inheritable qualities mentioned upon the adopted child. However reasonable it might seem for the adopting parent, who acted the parent's part in cherishing, maintaining and educating the child during infancy, and conferring upon it by adoption the rights of inheritance, should in turn be capable of inheriting from it, rather than the parent by nature, who surrendered the rights and duties of a parent towards it, this is an argument to be considered only by the law-making power. It is to the law of inheritance laid down by our intestate act that we must look for the heir of one who, possessed of personal estate, dies unmarried and intestate, leaving a parent surviving. The law casts the inheritance in such case upon the father and mother, or the survivor of them.¹⁰ Construing the words of the act strictly, as we are taught to do in the adjudications referred to as applied to the other act we have been considering, the terms 'father' and 'mother' can be applied only to the father or mother by nature. The estate of the decedent, therefore, in this case, goes to the sur-

⁵ 6 Pac. Rep. 381, 383.

⁶ 6 W. C. Rep. 119; S. C. Wash. T., Opinion by Turner, A. J.

⁷ Thompson's Charging the Jury, § 69.

⁸ 1 Montgomery County Law Rep. (Norristown, Pa.) 45.

⁹ Shafer v. Eneu, 54 Pa. St. R. 304.

¹⁰ See § 3 of act of April 8, 1833, P. D. 807 pl. 15.

viving father, whose inheritance is exempt from the payment of the collateral inheritance tax."

OBLIGATION OF LANDLORD TO REPAIR UNHEALTHY PREMISES.

The questions whether or not a landlord must not let unhealthy premises; and whether or not, after having let them, he must keep such premises in a healthy condition and repairs are questions that have not been settled. The adjudications are conflicting and do not advance a principle or rule by which this subject can be governed. Some courts place the non-liability of the tenant for rent, and hence the obligation of the landlord to repair, upon the ground of fraud; others on the ground of the implied covenant to repair and keep the premises tenantable while others deny the liability of the landlord to repair unhealthy premises unless bound to do so by writing. Stripped of the juridical reasoning exhibited in the adjudications; the proposition that a landlord must not rent unhealthy tenement, and must not, after notice, permit his tenement to become unhealthy for want of necessary repairs is in harmony with justice, reason humanity and the interests of Government, and should be the universal rule of law. Between the landlord and the tenant, the contract is for tenantable premises, and premises cannot be and are not tenantable if they are or become unhealthy. The tenant rents the place to live in. This is the purpose and object of the contract. The landlord and tenant both know this, and deal with each other for this object and purpose. If the premises at the time of renting are not healthy they are not fit to live in, and hence do not comply with the contract. If, after rented, they become unhealthy for want of repairs, they then become unfit to continue to live in, and hence unless made healthy the contract is not complied with.

The Conflict of Decisions.—The following cases¹ hold that the unhealthy condition of the

premises at the time of renting, or becoming so during occupancy is a constructive eviction and is ground to be released from the payment of rent, and hence assert the affirmative of the first proposition that the landlord must keep the premises in a healthy condition. On the other hand the subsequent cases² assert the contrary, and within some instances an incidental limitation.

Looking at these two different positions, one the opposite of the other, there should be no reason why the tenant is not relieved from the payment of rent when the premises become untenable, or unhealthy for want of repairs, because of the fault or neglect of the landlord. The landlord's liability for personal acts of negligence or fraud should not be mixed with his duty to repair. The liability is separate and distinct.³ The landlord is bound to repair where the law imposes the duty,⁴ and where he has done, or omitted to do any act rendering the demise untenable,⁵ and such a condition certainly exists, when the landlord allows or permits such want of repairs as to make the tenement unhealthy.

Statement of the Law.—It is stated by Wood⁶ that "Where certain defects exist that are likely to injuriously affect the health of the tenant or his family it is the landlord's duty to disclose the facts and failing to do so he is liable to the tenant for all the damages resulting to the tenant which are the immediate and proximate result of such failure.

v. Fonda, 12 Johns. 468; Gray v. Cox, 4 B. & C. 108; Laing v. Fidgeon, 6 Taunt. 108; Howard v. Holy, 23 Wend. 350; Pickering v. Dawson, 4 Taunt. 779; Jones v. Bright, 5 Bing. 533.

² Smith L. & T. 262; Woodfall L. & T. 493; Taylor L. & T. 5 381; 1 Pars. Cont. 589; 1 Wash. R. Prop. 473; Sutton v. Temple, 12 M. & H. 52; Hart v. Windsor, 12 M. & W. 68; Chappell v. Gregory, 34 Beav. 250; Carstairs v. Taylor, L. R. 6 Exch. 217; Cleves v. Willoughby, 7 Hill, 83; Royce v. Guggenheim, 106 Mass. 202; Elliott v. Aiken, 45 N. H. 36; Alston v. Grant, 3 El. & Bl. 127; Leavitt v. Fletcher, 10 Allen, 121; Brewster v. DeFrancey, 33 Cal. 341; Doupe v. Genine, 45 N. Y. 119; 2 Story Cont. 422.

³ Eaton v. Winnie, 20 Mich. 156; R. R. Co. v. Ogier, 35 Pa. St. 72; Garden v. R. Co. 40 Barb. 550; Ernst v. R. Co. 35 N. Y. 28.

⁴ McAlpine v. Powell, 1 Abb. 427.

⁵ Priest v. Nichols, 116 Mass. 401; Norcross v. Thoms, 51 Me. 503; Kirby v. Ass'n, 14 Gray, 249; Gray v. Gas Co. 114 Mass. 149; Alger v. Kennedy, 49 Vt. 109.

⁶ Landlord & Tenant, 624; citing Minor v. Sharon, 112 Mass. 477; Wilson v. Finch, Hatton L. R. 2 Exch. Div. 236; Eakin v. Brown, 1 E. D. Smith, 36; Wallace v. Lent, 1 Daly, 481; Staples v. Anderson, 1 Robt. 327; Meeks v. Bawerman, 1 Daly, 100.

¹ Smith v. Marrable, 1 M. & W. 5; Edwards v. Hetherington, 7 D. & R. 117; Collins v. Barrow, 1 Moo. & R., 112; Salisbury v. Marshall, 4 C. & P. 65; Cowle v. Goodwin, 9 C. & P. 378; Gilhooly v. Washington, 4 N. Y. 217; Gallagher v. Waring, 9 Wend. 20; Van Bracklin

There is a strong tendency to hold that the tenant is absolved from the lease (or rent) if there are latent defects in the premises or causes not readily discoverable on examination which renders the premises unfit for occupancy, of which the landlord knew and did not inform the tenant; but this is not well established and is contrary to the weight of authority."

It is stated by Parsons⁷ that a landlord is under no implied obligation to repair and that the uninhabitableness of a house is not a defense to an action for rent. But if the landlord does a positive wrong such as an erroneous or fraudulent misdescription of the premises or if it is made uninhabitable by the landlord's own acts the tenant can leave the premises. It is stated by Story,⁸ that the landlord impliedly covenants that the premises are fit for beneficial occupation, as where the wall of a privy gave way and overflowed the kitchen with filth and impregnated the water in the pump, and the landlord did not remove or repair it after notice, he cannot recover rent,⁹ or where a furnished house was let and the beds were infested with bugs to such an extent as to render them unfit for occupation, the landlord cannot recover rent.¹⁰ But this doctrine has been overruled in England and denied in America and the rule laid down that the fact that the premises are unwholesome will not entitle the tenant to quit them (1) where he knew or could have known the fact and (2) where the landlord has not been guilty of fraud or misrepresentation and is in no default.¹¹

In substance these authors hold that a landlord is not obliged to repair unhealthy premises made so by want of repairs, and is not obliged to disclose the fact that the premises are unhealthy if the tenant knew or could have known it.

Analysis of the Cases.—In *O'Brien v. Capwell*¹² the Court said that the "law is well settled that where there is no fraud or false representation or deceit, no express warranty

or covenant to repair, there is no implied obligation or covenant that the premises are suitable or fit for occupation or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use, or that they will continue so. In *Robbins v. Mount*¹³ the court said if there is no express agreement, there is no obligation on the part of the landlord that the premises shall continue fit for the purposes for which they were demised, or that they are in a tenable condition, or that they will continue so. The same court went further and held that there was no obligation to repair unless there is an express agreement or a fraudulent or mistaken misdescription.¹⁴ This has been adopted in other cases.¹⁵ *Scott v. Simons*¹⁶ was on action for damages for injuries caused by the negligence of the landlord improperly constructing a drain and suffering it to remain defective whereby the tenant's goods were damaged by overflow of water for which cause the tenant left the premises. The court held that the landlord was not liable, because he was only liable to repair the drain under an express covenant, the obligation to repair not being implied. In *Westlake v. DeGraw*¹⁷ the premises were infected with sickening and noxious smells arising from dead rats. The landlord knew of the smells but did not disclose it to the tenant. The smell produced sickness. The landlord was informed and sent a carpenter to remove the cause, but the tenant abandoned the house before the carpenter got to work. The court held the tenant liable for the rent. The court must have placed the liability on the speedy removal of the cause by the carpenter, because it was certainly a fraudulent concealment of the facts, for the landlord not to disclose the infection which he knew. The question of an implied covenant to repair did not arise. If this is the ground, it is contrary to *Whitehead v. Clifford*,¹⁸ *Wallace v. Lent*,¹⁹ and *Sutton v. Temple*.²⁰ The Court in *Wallace v. Lent* held

⁷ 3 Pars. Cont. 501.

⁸ 2 Story Cont. 422.

⁹ Citing *Cowie v. Goodwin*, 9 C. & P. 378.

¹⁰ Citing *Smith v. Marrable*, 11 M. & W. 5.

¹¹ Citing *Westlake v. De Graw*, 25 Wend. 669; *Foster v. Peyser*, 9 Cush. 242; *Dutton v. Gerrish*, 9 Cush. 89.

¹² 59 Barb. 504.

¹³ 4 Rob. (N. Y.) 553.

¹⁴ *Cleves v. Willoughby*, 7 Hill, 83.

¹⁵ *Howard v. Doolittle*, 3 Duer, 464; *Mumford v. Brown*, 6 Cowen, 475; see *Chitt. Cont.* 338; *Taylor L. & T.* 166.

¹⁶ 54 N. H. 429.

¹⁷ 25 Wend., 669.

¹⁸ 5 Taunt., 508.

¹⁹ 1 Daly, 482.

²⁰ 12 M. & W., 52.

that it was a good defense to an action for rent, that the landlord did not tell the tenant of a stench in the house which he knew existed, and which subsequently caused the tenant's sickness; stating that "if the landlord knew of any cause which renders the house unhealthy he must disclose it. If he does not it is procuring an innocent person to rent a house which he knows is unfit." In *Sutton v. Temple* the court announced the same doctrine, but held the tenant liable because the landlord did not know of the poisonous substance or smell.

In *Weeks v. Bawerman*,²¹ the defense to the suit for rent was that the premises had been occupied as a brothel, which fact the landlord did not disclose to the tenant, and in consequence the tenant was insulted and annoyed by lewd persons calling at all hours of the night to such an extent that he had to leave and could not quietly and peaceably occupy the premises; the court held that this was no defense; that the landlord was not bound to disclose the uses to which the premises had been previously put, and that there was no implied warranty that the premises were suitable for the purposes rented. "*Caveat emptor*" applies to this case, and to all transfers of property, and purchasers take the risk of its quality and condition unless protected by an express agreement; the only exception being sales of provisions for domestic use, as in *Van Bracklin v. Fonda*,²² and a demise of ready furnished lodgings, as in *Smith v. Marrable*.²³

In *Staples v. Anderson*,²⁴ and *Carnfout v. Fowke*.²⁵ It was a good defense to an action for rent that the landlord knew that the house had formerly been occupied as a brothel and concealed that fact from the tenant, who was compelled to remove in consequence of the annoyance. The court held this to be a fraudulent concealment.

In *Minor v. Sharon*,²⁶ the landlord knew that the house was infected with the small-pox so as to be unfit for occupation, and to such an extent as to endanger health, and con-

cealed this fact from the tenant. The tenant engaged the house and occupied it. He and his family took sick by reason of the infection. He was ignorant of the dangerous condition of the house, and no act on his part contributed to the sickness. The court held the landlord guilty of actionable negligence and liable for all the injury the tenant sustained; stating, that as the landlord knew the house was infected, it was his duty to inform the tenant or refrain from renting it until it was properly disinfected, and as he did not do this, he was guilty of negligence. Although this case is cited to sustain the proposition as to the want of repairs, in fact it rests on the doctrine of negligence, which is sustained in the following cases.²⁷

In some English cases,²⁸ and especially *Izon v. Garton*,²⁹ the tenant was released from the rent on the ground, first, that the landlord erred or fraudulently misdescribed the premises; or, secondly, that the premises were found or became uninhabitable by the wrongful act or default of the landlord himself. This conclusion was reached and sustained in *Hart v. Windsor*,³⁰ after a review of all the prior cases, and was adapted and followed in *Surplice v. Farnsworth*,³¹ and in New York, Maine and Massachusetts.³²

The case of *Dutton v. Garrish*,³³ asserts the same doctrine, but this was a case on a written lease, and the court would not admit parol testimony to show that the landlord warranted it fit for occupation and to continue so, nor draw an implied warranty from a written lease. So in a late case in New York,³⁴ the tenant moved out of a house which had been declared by the board of health to be unhealthy on account of the bad condition of the plumbing, notice to that effect having been given to the

²⁷ *Sweeney v. R. Co.*, 10 Allen, 368; *Carleton v. Iron & Steel Co.*, 99 Mass. 216; *French v. Vining*, 102 Mass. 132.

²⁸ *Cowie v. Goodwin*, 9 C. & P. 378; *Salisbury v. Marshall*, 4 C. & P. 65; *Collins v. Barrow*, 1 Mood & Rob. 112; *Shepherd v. Pybus*, 3 M. & G. 867; *Edwards v. Heatherington*, 7 D. & R. 117.

²⁹ 5 Bing. (N. C.), 501.

³⁰ 12 M. & W., 68.

³¹ 7 M. & G., 576.

³² *Foster v. Peyser*, 9 Cush. 242; *Libbey v. Talford*, 48 Me. 316; *Post v. Vetler*, 2 E. D. S. 248; *Ins. Co. v. Scott*, 2 Hilton, 550; *Gardner v. Keteltas*, 3 Hill, 530.

³³ 9 Cush., 89.

³⁴ Not reported.

²¹ 1 Daly, 100.

²² 12 Johns., 468.

²³ 1 Carr. & M., 479. See *Cleves v. Willoughby*, 7 Hill, 88.

²⁴ 3 Robt., N. Y. 327.

²⁵ 6 Mees. & W., 359.

²⁶ 112 Mass., 477.

landlord. The landlord brought suit for his rent, and the defense claimed that there had been a constructive eviction by reason of the unhealthy condition of the premises. The court held that if the health of the tenant or his family is imperiled by the neglect of the landlord to make necessary repairs in the plumbing of the house the tenant is in effect deprived of the beneficial enjoyment of the premises, and may therefore move out without paying rent. This case asserts the proposition in conformity with a number of cases, and with the proposition set forth in the beginning, that if the premises become unhealthy because of the landlord's neglect to repair, after notice, it is a constructive eviction of the tenant, and he is not liable for the rent.

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LIABILITY OF COMPANY ON FORGED SHARE CERTIFICATE.

That a company would be liable in respect of a share certificate issued by the secretary, within the scope of his authority, notwithstanding that it was fraudulently issued, must be taken as clear law.¹ The only question in such a case, indeed, is whether the agent was acting in the ordinary course of his employment; and it makes no difference whether the principal is a natural person or a corporation.² Moreover, we find it there held that, in like manner, a corporation is liable to the owner of stock whose name has been forged to a transfer of the certificate, the corporation officers acting thereon in good faith, having cancelled the old certificate and issued a new certificate to the supposed lawful holder by such forged transfer.³ But, in a most thorough

and painstaking work, which has just been published (Emeden's Annual Digest, 1885), we have found a reference to another English case, which appears to be unique in an important respect, so far as our investigation has extended, and it will be well to draw direct attention to the decision there made.

The material facts in *Shaw v. Port Phillip Gold Mining Co.*,⁴ were as follows: On December 1st, 1880, Thomas Gledhill bought through the plaintiff, as his broker, 200 of the defendant company's shares, and the plaintiff received, as buying broker from the selling brokers, a transfer of forty shares, signed by a Mr. Schofield, accompanied by the certificates of the shares, and a transfer of 160 shares, signed by a Mr. Purchase, the company's then secretary, also accompanied by what purported, and in all respects appeared, to be regularly signed certificates of those shares. In January, 1881, Gledhill deposited the aforesaid transfers and certificates at the company's offices in London with the said Mr. Purchase, the company's secretary, and requested that the company should register him as proprietor of the said 200 shares, and issue him a certificate for the said shares in the usual way. On March 16th, 1881, a certificate, or what purported, to be a certificate, of the said 200 shares, and of the registration thereof, was forwarded by the company's secretary to Gledhill. This certificate purported to be signed by one of the directors and by Mr. Purchase, the secretary, and bore the seal of the company, and was in the usual and authorised form in all respects. It was part of the regular and authorised duty of the said Mr. Purchase, as the company's secretary, to receive and examine transfers and certificates of shares, to have transfers registered to procure the preparation, execution, and signature of certificates with all requisite and prescribed formalities, and thereupon to issue them to the persons entitled to receive them. By the deed of settlement of the company it is provided that "the secretary shall keep in safe custody the books and the common seal of the company, affixing the seal of

¹ The *Bahia* and *San Francisco R. Co.*, L. R. 3 Q. B. 584, 37 L. J. Q. B. 176; *Barwick v. The English Joint Stock Bank*, L. R. 2 Ex. 259, 36 L. J. Ex. 147; *Swift v. Winterbotham*, L. R. 8 Q. B. 244, 42 L. J. Q. B. 111; *Swire v. Francis*, L. R. 3 App. Cas. 106; 47 L. J. Q. B. 56.

² *MacKay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Swift v. Jewsbury*, L. R. 9 Q. B. 312. And so it has been held in America: *N. Y. & N. H. R. Co. v. Schuyler*, 34 N. Y. 90, 80; *Bank of Kentucky v. The Schuykill Bank*, 1 Pars. Eq. R. 180; *Willis v. Fry*, 13 Phila. R. 33.

³ *Pratt v. Machinists Nat. Bank*, 123 Mass. 110; *Pratt v. Boston & Albany R. Co.*, 126 ib. 443;

Blaisdell v. Bohr, 68 Geo. 56; *Pollock v. Nat. Bank*, 3 Selden, 274. That, too, is the English law: *Sloman v. Bank of England*, 14 Sim. 475; *Midland R. Co. v. Taylor*, 8 H. L. Cas. 751.

⁴ 13 Q. B. D. 103, 53 L. J. Q. B. 309, 50 L. J. N. S. 685.

the company, or allowing its use to such documents, and on such occasions only, as he is authorised and required to affix it, or allow it to be used by the board of directors by resolution duly passed." By a resolution of the board of directors duly passed, it was ordered "that the seal be only used in the presence of either the chairman or deputy-chairman; and that certificates of shares be signed by one director, the secretary, and the accountant." At the time of issuing the certificate in question J. W. Purchase was both secretary and accountant. The company in March, 1881, paid a dividend to Gledhill upon the 200 shares, by check signed by the secretary and two directors of the company. Gledhill subsequently deposited the certificate for the 200 shares with the plaintiff, who was his stockbroker, by way of security for any moneys which might become due from him to the plaintiff. In December, 1882, the plaintiff gave the company notice that the certificate for 200 share had been so deposited with him as security. He was then informed by the company that there was no such number of shares standing in Gledhill's name in their books; that the signature of the director appended to the certificate was forged, and the seal of the company was affixed thereto without the knowledge or authority of any of the directors. Neither Gledhill nor the plaintiff had, up to the date of such communication, any knowledge or ground for suspecting that the certificate was not a genuine document. Gledhill subsequently executed what, in form, was a legal transfer of the 200 shares to the plaintiff, and the plaintiff left such transfer with Mr. Matthias, the present secretary of the company with a request that the 200 shares should be registered in his name, pursuant to such transfer. The company declined to register the transfer, or to recognise the plaintiff's title to any of the said shares except the aforesaid forty, as to which they were willing to recognise his title. The question for the court, on a case stated, was whether the plaintiff had a good title, as against the company, to the said 160 shares; and if the opinion of the court was in the affirmative, judgment was to be entered for the plaintiff for the value of those shares. Now, on those facts, it will be observed that the great distinction between this case and

those already cited was, that here a forgery was committed by the company's agent, without which the fraud could not have been committed. What was done, it was argued on behalf of the defendants, was an independent crime by the secretary, wholly outside the scope of his employment, and his criminal act could not therefore bind the company. But, although a corporation cannot commit a real crime, it is unquestionable that it is even liable to indictment in some cases;⁵ and if liable by reason of the fraud of its agent, why should it not be liable by reason of a crime of this character, committed in the course of his business for his principal? Stephen and Mathew, J.J., failed to see how the carrying out of the fraud by means of a forgery practically differed from any other mode of carrying out a fraud so as to entitle the company to any advantage. "It cannot, I think," said Mathew, J., "be the duty of the person taking the certificate properly issued from the office, and apparently in order, to go and at his risk find out whether that which purports to be the signature of a director is genuine or not. The secretary is placed in a position to warrant the genuineness of the signature and of the seal, and I fail to see what difference it makes in respect of the liability of the company whether the fraud be carried out by a fraudulent representation of the genuineness of the signature or by the actual forgery of it." Why, indeed, should an innocent person be made to suffer for the criminal fraud of an officer who was duly constituted by the company as the proper person to issue the document; and if the company needed redress it should be sought against their own officer.⁶

—*Irish Law Times*.

⁵ See Pollock, Cont. ch. 2.

⁶ See *Boston & Albany R. Co. v. Richardson*, 135 Mass. 473.

ACTION FOR DIVORCE PROSECUTED BY GUARDIAN.

BIRDZELL v. BIRDZELL.

Supreme Court of Kansas, April 10, 1885.

The guardian of an insane woman cannot bring and maintain an action against her husband for divorce and alimony, or for alimony alone.

VALENTINE, J., delivered the opinion of the court:

This was an action brought by John Tucker, in the name of "Margaret Birdzell, by John Tucker, her guardian," against Caleb J. Birdzell, to obtain a divorce on the part of Margaret Birdzell, an insane woman, from her husband, Caleb J. Birdzell, and for alimony. The case was tried before the court, without a jury, and the court refused to grant the divorce, for the reason that it deemed itself powerless to grant a divorce to an insane person, but granted the alimony for the gross amount of \$5,000 and decreed that the same should be a lien upon the homestead of the plaintiff and the defendant. The court also decreed that the homestead should be sold to satisfy the judgment for alimony, and that a general execution might afterward be issued against the property generally of the defendant to satisfy any remainder that might still be due upon the judgment; and decreed that said allowance of \$5,000 should be in full of all claims that might ever be made by the plaintiff upon the defendant or upon his estate. After this judgment was rendered, and after a motion for a new trial was made and overruled, the defendant, as plaintiff in error, brought the case to this court, and he now asks for a reversal of such judgment.

Several questions are presented to this court, but we think a decision of the first and principal question in the case will render it unnecessary to consider or decide any of the other questions raised. Such first and principal question is whether an action for divorce and alimony, or for alimony alone, can be brought and maintained by the guardian of an insane woman. It seems to be almost admitted by counsel for the defendant in error, plaintiff below, that the action for divorce cannot be maintained; but such counsel still insists that an action for alimony may be maintained. It seems, however, clear to us that both actions must be placed in the same category. We shall consider the question with reference to divorce first.

Marriage is a personal status and relation assumed for the joint lives of the parties assuming the same. It can never be created or brought into existence except with the free and voluntary consent of the parties assuming the same, and it can never be dissolved or destroyed, while both parties are living, so as to affect an innocent party thereto, except for a grievous and essential wrong committed against such relation by the other party, and with the free and voluntary consent, and, indeed, with the active and affirmative volition, of the wronged and innocent party. In other words, the marriage status and relation of an insane person, who has given no cause for a divorce, cannot be dissolved or abrogated at all, for it cannot be dissolved or abrogated except with the voluntary consent of such insane person, and such insane person is incapable of giving any consent to such a dissolution or abrogation. How could a

guardian conduct the mind of his insane ward through the ceremony that would make him or her a husband or wife? Or how could he conduct such mind through a litigation that would undo the marriage relation? Marriage might be ever so beneficial to the ward, financially or otherwise, but as it depends upon the intelligent volition of the party to be married, the guardian could not effect it; or if it existed, he could not inaugurate and conduct a proceeding that would destroy it. There are no wrongs that may be committed by a husband or wife sufficient in and of themselves to work a dissolution of the marital ties. The injured party may be willing to condone the wrong, or, for reasons satisfactory to himself or herself, may desire to continue the marriage relation, notwithstanding the wrong. In the present case, some of the wrongs charged against the defendant existed prior to the insanity of the plaintiff. Can the guardian say that she did not condone them? Many persons believe that marriage is a sacrament, and that to procure a divorce upon any of the ordinary grounds for which divorces are usually granted is a violation of all true religion and morality. Should such a person be divorced, though innocent himself or herself, without his or her consent? And could a guardian for such a person, if he or she should become insane, give the necessary and required consent? Besides, insanity is often temporary; and what if such insane person should become restored to sanity immediately after the divorce, and should disapprove the divorce and all the proceedings connected therewith? Whether a party who is entitled to a divorce shall commence proceedings to procure the same or not, is a personal matter resting solely with the injured party, and it requires an intelligent election on the part of such party to commence the proceedings, and such an election cannot be had from an insane person. As sustaining the foregoing views, we would refer to the following authorities: *Worthy v. Worthy*, 36 Ga. 45; *Bradford v. Abend*, 89 Ill. 78; 2 *Bishop on Marriage & Divorce*, § 306a. Also, § 641 of the Civil Code provides that "The petition (for a divorce) must be verified as true by the affidavit of the plaintiff." An agent or attorney or guardian is not mentioned. See *Baker v. Knickerbocker*, 25 Kas. 290. Also, both parties are allowed to testify in divorce cases. *Laws of 1871*, ch. 116; § 6; *Comp. Laws of 1879*, ch. 80, § 651a.

We now come to the question of alimony. May the guardian of an insane wife commence and maintain an action against the husband for alimony? There is no statute in this State that in terms authorizes any such thing, and we think the implications of the statutes are all against it. Alimony may be allowed as an incident to a divorce, or it may be allowed in a separate action and without a divorce. What we have already said in this opinion with reference to divorce will dispose of the question as to whether the alimony may be granted as an incident thereto. We shall now

proceed to consider the question whether it may be granted without a divorce. The statute providing for alimony without a divorce reads as follows:

"Sec. 649. The wife may obtain alimony from the husband without a divorce, in an action brought for that purpose in the district court, for any of the causes for which a divorce may be granted. The husband may have the same defense to such action as he might to an action for a divorce, and may, for sufficient cause, obtain a divorce from the wife in such action." Civil Code, § 649.

It will be seen that alimony without a divorce may be obtained, only for the same causes for which a divorce may be obtained. Now, we have just held that an insane woman cannot obtain a divorce, for the reason that she cannot exercise her choice or election to do so; and that her guardian cannot do so for her. The statute also provides that "The husband may make the same defense to such action as he might to an action for a divorce;" and we have just held that the husband may defeat the action for divorce. The statute also provides that the husband "may, for sufficient cause, obtain a divorce from the wife in such action." Now, can a husband obtain a divorce from an insane wife? Can a guardian defend for her? She has a right to testify in a divorce case. Could her guardian supply this testimony? A part of the grounds for divorce and alimony in the present case existed before the plaintiff became insane. Can the guardian say that she did not condone the wrongs upon which these grounds rest? In this State there is no such thing as a divorce *a mensa et thoro*, or merely from bed and board. The plaintiff and defendant are still husband and wife absolutely and entirely. She will inherit from him, or he from her at least one-half of the other's estate, notwithstanding the judgment of the court below; and the husband is still liable for her support. And there are better remedies to enforce this support than the strange one resorted to in the present case. There are all the common law remedies. And there are the still further remedies furnished by §§ 13, 43, 44, 45 and 46, of ch. 60 of the general statutes. (Comp. Laws of 1879, ch. 60, § 13, 43 to 46.) Could the homestead be sold without "the joint consent of the husband and wife?" (Const. Art. 15, § 9). The husband has not consented, and when the wife is restored to sanity, as she may be, she may claim that she has never consented; and of course she has not consented.

After a careful consideration of this case we have come to the conclusion that the guardian of an insane woman cannot maintain an action against her husband for alimony.

The judgment of the court below will be reversed and cause remanded for further proceedings in accordance with this opinion. HORTON, J., concurring; JOHNSTON, J., not sitting.

DESCENT FROM UNMARRIED ORPHAN MINOR WITHOUT BROTHERS OR SISTERS.

DECOSTER v. WING.*

Supreme Judicial Court of Maine, Nov. 7, 1884.

When a minor dies never having been married, leaving no parents, brother or sister, or the issue of any brother or sister, his property, though inherited from his father, descends to his surviving maternal grandmother, in preference to his uncles or aunts.

On exceptions.

Appeal from the decree of distribution of the probate court in the estate of defendant's intestate, Charles L. Bicknell.

The opinion states the material facts.

J. and F. H. Appleton, for the appellant; Geo. C. and Charles E. Wing, for appellee.

VIRGIN, J., delivered the opinion of the court:

The decedent died under age, not having been married, leaving property for distribution, some of which he inherited from his father and the remainder from his paternal grandfather. At the time of his decease he left no parents, brother or sister, but did leave a maternal grandmother, three maternal uncles and one maternal aunt, two paternal aunts and two children of a deceased paternal aunt.

The judge of probate decreed that the maternal grandmother is entitled to the property as next of kin, under the provisions of Rev. Stat., c. 75, § 1, rule 5. The paternal aunts claimed that they and the children of their deceased sister should take the property under clause 6, and appealed to the Supreme Court of Probate.

Personal property being distributed by the same rules as regulate the descent of real estate (subject to certain provisions not material to the decision of this case), the question is, under which rule of descent does the property in controversy fall.

It is common knowledge among the members of the profession that our statutes of descent were derived substantially (through the provincial statutes 4 Wm. and Ma. c. 2; 9 Ann. c. 2, and the early statutes of our mother commonwealth) from the English statutes of distribution 22 and 23, Car. 2, c. 10, and 1 Jas. 2, and that they apply equally to personal and real estate. *Sheffield v. Lovering*, 12 Mass. 490; *Reeve, Des. xxvi*. What is now clause 6, under which the appellants claim the property, was, in the Stat. 4, Wm. and Ma., in the form of a proviso to the preceding rule, providing, "if any of the children happen to die before he or she come of age or be married, the portion of such children shall be equally divided among the survivors." An. Chart. 231. The mother took nothing. "This term 'survivors'" (say the court in *Runey v. Edmunds*, 15 Mass. 292), "must have reference to the surviving children, as [a distribu-

tion among children is the subject matter of the whole proviso."

These provisions remained the same until revised and substantially incorporated in Mass. St. 1783, c. 36. But the language having been somewhat changed and the meaning rendered less clear, "the obscurity in this and other particulars was supposed to have been one of the principal motives for the new statute on this subject, of 1806, c. 90. The chief object of the legislature in this statute (which is understood to have been prepared by the late Ch. J. Parsons) seems to have been, not to establish new rules of descent and distribution, but to adopt and confirm, in clear and explicit language, the legal construction which had been given to the preceding statutes, and which had been considered the law of the country for more than a century." *Sheffield v. Lovering*, 12 Mass. 490, 493.

The Mass. St. 1806, c. 90, provided *inter alia*: "If the intestate leave no issue, father, brother or sister then his estate shall descend to his mother, if any; but if there be no mother, then to his next of kin in equal degree," etc: "Provided, however, that when any child shall die under age, not having been married, his share of the inheritance that came from his father or mother, shall descend in equal shares to his father's or mother's other children then living respectively, and to the issue of such children as are then dead, if any, by right of representation."

Our St. 1821, c. 38, § 1, is a literal transcript of the foregoing; and it remained the same until the revision of 1841, when the legislature with the evident intention of rendering the meaning of the proviso more clear, used a few more words to express it, thereby making it read: "Provided, however, that if any person shall die leaving several children, or leaving one child and the issue of one or more others, and any such surviving child shall die under age, not having been married, all the estate which came to the deceased child by inheritance from such deceased parent, shall descend in equal shares to the other children of the same parent, and to the issue of such other children who shall have died, by right of representation." R. S., (1841) c. 93, § 1, cl. 6.

"This proviso," said Ch. J. SHAW, speaking of the same clause in Mass. st. 1806, c. 90, § 1, hereinbefore quoted, "is an exception from the generality of the antecedent rule." *Nash v. Cutler*, 16 Pick. 498-9.

It is the only provision in the statute of descent which makes it necessary to inquire from what source an estate is derived in order to settle its descent or distribution. *Kelsey v. Hardy*, 20 N. H. 479. It relates solely to property inherited, *i. e.* coming to the decedent by operation of law, as contra distinguished from that acquired by any lawful act, including title by deed and by devise. It relates to the descent and distribution of the inherited property of a child who died under age, never having been married, among other children

only, or among the issue of other deceased children, and makes no illusion to any ascending line of descent. Or to repeat the comprehensive language of C. J. Parker, quoted *supra*, "a distribution among children is the subject matter of the whole proviso."

To bring property within this proviso, therefore, it must be inherited from one of the decedent's parents and not be derived by purchased or inheritance from any other source. *Nash v. Cutler*, 16 Pick. 491; *Sedgwick v. Minot*, 6 Allen, 171; *Cables v. Prescott*, 67 Maine, 583. And to bring a case within the terms of the proviso so far as persons are concerned, there must be (1) several children, one of whom died under age without having been married; or (2) one child who died as above and the issue of one or more others. In other words, if the minor whose estate is to be distributed left at his decease no brother or sister, nor the issue of any, then his estate does not fall within the terms of the proviso, but, although inherited, it must go by the general rule unaffected by the terms of the former.

This same proviso in substance and meaning was incorporated in the revision of 1857; although in attempting to condense it, "the language," said the late Judge Kent in *Benson v. Swan*, 60 Maine, 160, 163, "got a little mixed," so much so, that the counsel for the defense in the case last cited, contended that the terms of the clause made it applicable only to cases where there are grandchildren as well as children. But the learned judge, after stating the defendant's claim, said: "We do not perceive any intention on the part of the legislature to change or limit the provisions clearly set out in the original statute, by the change of phraseology. We should require the most positive and unmistakable evidence of such intent, because such a construction as is contended for, would be clearly in contravention of the spirit and intent of the provision."

It is urged, however, that the effect of this proviso is to place the estate of a deceased unmarried minor in the same situation as if he had died before the parent, or had never existed. This was the remark of Jackson, J., in *Sheffield v. Lovering*, *supra*. But the statement was based upon the assumption that there were one or more other children and was strictly correct. A like remark was also made by Shaw, C. J., in *Nash v. Cutler*, *supra*, and by Kent, J., in *Benson v. Swan*, *supra*, all based upon the fact that the deceased child left one or more brothers or sisters or the issue of one or more deceased brothers or sisters and explanatory of the reason why this provision of the statute did not give any of the property of the minor to his mother. "General propositions of judges, however eminent, as rules of decisions," said the court in *Blanchard v. Russell*, "must be limited in their application to the facts, although they are not limited in their expression." 13 Mass. 7. "It is a general rule," said C. J. Marshall, "that the positive authority of a decision is co-extensive

only with the facts on which it is made." Ogden v. Saunders, 12 Wheat. 333. And the same eminent judge also said: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision." Cohens v. Virginia, 6 Wheat. 399.

An examination of the Massachusetts and Maine cases cited above shows that the remark mentioned was intended to be limited to the facts of the respective cases. Thus Shaw. C. J., in construing the proviso, said: "We think the effect is that where, upon the descent of an estate to children, one of them shall happen to die in infancy—that is at any time before arriving at the age, at which, by law, he has the power of disposing of his estate, and before he has by marriage contracted obligations and established new connexions which change his relative situation to others, his share of the inheritance, that is, his portion of the estate, for the descent of which this statute is now providing, shall go just in the same manner as if such child had died in the life-time of the ancestor, or in other words, to those who would have taken the same share if such child had not existed. It directs that it shall go to the other children of the same parent from which it came, which it would have done had the child so dying not been in existence at the time of the decease of such parent." Nash v. Cutler, 16 Pick. 498-9. This last sentence makes certain the intended extent of the preceding statement.

So Judge Kent, in the case cited, *supra*, in settling the descent of the estate of a child which died at the age of twenty-four days, leaving a sister of the half-blood, said: "When a minor dies, never having been married, the law intends that the specific inherited property shall, in effect, go back to the parent's estate and become a part of it, as if the child had died before the parent," and cites the Massachusetts' cases *supra*. This statement of the learned judge was made, with reference, and should be considered as limited in its application, to the fact that there was another child. And that it was so intended conclusively appears from the next succeeding sentences: "The distinction and the reason for it are both obvious. The child having died a minor, never having been married, and having received a portion of the estate of his parent, which he leaves, the law deems it just that his share of the parent's estate should go to the other children and grandchildren." Benson v. Swan, 60 Maine, 161-2. We therefore cite the Massachusetts cases *supra* and Benson v. Swan, as supporting the position that when there is only one child and he dies leaving property inherited from his parent, and such child leaves no issue of any brother or sister, its descent or distribution does not fall within the proviso of R. S., (1841) c. 93, clause 6, but it does come within the provisions of the antecedent rule 5.

When the clause was revised and condensed as before seen, its meaning was somewhat obscure, and it was unintentionally limited to property inherited from the father only. Consequently, the legislature of 1870, substituted therefor, almost *in totidem verbis*, the original provision of statute 1821, omitting the words, "provided however." But the meaning is the same as in R. S., 1841, and has been incorporated in the revisions of 1871 and 1883; R. S., c. 75, § 1, clause 6.

The rule applicable to this property then, for want of the persons specified in clause 6, is rule 5. It becomes immaterial therefore, as before seen, that it was inherited from the decedent's parent; and it must go to his "next of kin." Computed by the rules of the civil law (as required by R. S., c. 75, § 2) a maternal grandmother being of the second degree of kindred, and uncles and aunts of the third, the grandmother must take the property as this rule directs and not the uncles or aunts. Blackborough v. Davis, 1 Peere, Wms. 41; Reeve. Desc. lvi; Cables v. Prescott, 67 Maine.

Exceptions overruled. Decree of judge of probate confirmed. Remanded to probate court.

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

ACTION FOR DEATH BY WRONGFUL ACT, ETC.

VAWTER, ADMR. v. THE MISSOURI PACIFIC RAILWAY COMPANY.

Supreme Court of Missouri, March, 1884.

1. *Action for Death by Wrongful Act, etc.*—The right of action for the death of a person caused by the wrongful act, neglect or omission of another is purely, statutory, and statutes giving this right of action can have no extra-territorial effect. If such statutes are to be administered outside of the jurisdiction where enacted, this must be done on principles of comity. The weight of authority is to the effect that these statutes can be enforced only by the courts of the jurisdiction where the wrong is suffered and the right of action is given.

2. *Right of Action by Administrator of Missouri under Kansas Statute.*—The statute of Missouri, R. S. 1879, § 97, expressly inhibits the prosecution by an administrator of a civil action for injuries to the person of the intestate; therefore an administrator appointed in Missouri, will not be permitted to sue in this State under the statute of Kansas, for the death of the intestate in Kansas.

Appeal from Moberly Court of Common Pleas. For. T. J. Portis and H. S. Priest for appellant; Hon. James Ellison, for respondent.

BLACK, J., delivered the opinion of the court: Plaintiff is the widow of W. R. Vawter, and was appointed administratrix of his estate by the Probate Court of Schuyler County, Missouri. She brings this suit in her representative capacity, against the defendant, to recover damages for the

death of her husband. He was in the employ of the defendant. While making a trip over the road, his train left the main track and ran on a side track, at Parsons, in the State of Kansas, came in collision with a stock train, and he was killed. His death, it is alleged, was caused by the negligence of defendant's servants in leaving the switch at that place, in an improper position. Defendant contends that he and those engaged with him on his train were guilty of negligence in running the train at a rate of speed prohibited by the defendant's rules, because of which he was killed.

1. Civil actions for the death of a person caused by the wrongful act, neglect or omission of another, did not exist at common law. A right of action in such cases is given by the statute law of any of the States.

These statutes have no extra-territorial effect, so that, as is conceded in this case, the plaintiff, if she can recover at all, must do so by force of the statute of the State of Kansas, and not because of any statute of this State.

To that end she pleads, and bases her right to recover upon two sections of the statutes of that State, which are as follows:

"When the death of one is caused by a wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury for the same act or omission. The action must be commenced within two years. The damages can not exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next to kin, to be distributed in the same manner as personal property of the deceased."

Also: "Every railroad company organized or doing business in this State shall be liable for all damages done to employees of such company in consequence of any negligence of its agents, or of any mismanagement or its engineers, or other employees, to any person sustaining such damages."

The question arises whether she can maintain this action in this State. The following authorities support her claim of right so to do.

Leonard v. The Columbia Steam Navigation Company, 84 N. Y. 48; Dennick v. Railroad Company, 103 U. S. 11. The first of these two cases is, in a large degree, placed upon the ground that the statute of the State of Connecticut where the cause of action accrued, was in all material respects the same as that of New York. The other was also brought in the State of New York, though the action was founded on the statute of New Jersey. In both of these States it would seem the personal representative was the proper and only party to sue, in such cases. There is no material difference between the statute of the State of Kansas and that of the State of Illinois in the respect under consideration. The St. Louis Court

of Appeals in *Steakman v. Terre Haute and Ind' R. Co.*, not yet reported, came to the conclusion that an administrator appointed in this State might prosecute such a suit under the statute of Illinois. In *Taylor v. The Pennsylvania Company*, 78 Ky. 348, the death occurred in the State of Indiana. The administratrix of the estate of the deceased was appointed in the State of Kentucky, and brought her suit in the courts of that State, founding her right to recover upon the statute of the State of Indiana, which is precisely the same as the first of the sections of the statute of Kansas, above quoted. The court in that case denied the right and power of the administratrix to prosecute the suit in the courts of the State of Kentucky, and, among other things, said: "A Kentucky administrator, suing in a Kentucky court, must be able to show that the laws of Kentucky entitle him to the thing sued for. He can not receive his office from one jurisdiction, and appeal to the laws of another jurisdiction for rights or power not given by the law which created him."

Other courts, where the same question was involved, have been equally positive in the assertions of the same doctrine. *Woodward v. The Michigan Southern & Northern Indiana R. Co.*, 10 Ohio St. 121; *Richardson v. New York Central R. Co.*, 98 Mass. 85. By the statute of Kansas, the right of action accrues to the personal representative, the executor or administrator. The damages enure to the exclusive benefit of the widow and children, or next of kin, and do not constitute the assets of the estate, but rather a trust fund for the designated persons.

Here the amount fixed, is, in part of the nature of a penalty, and can only be recovered by designated relatives.

The rule of law which exempts the master from liability from damages, occasioned to one servant by the negligent act of a fellow-servant, is in force in this State, but by the statute of that State, so far as relates to employees of railroad companies, has been abrogated by the statute pleaded in this case. An administrator appointed in this case receives his power and authority to sue from the laws of this State, and from this State alone, to which he is amenable throughout the entire course of the administration.

There is no statute of this State by which he has or can have anything to do with suits of this character, or the damages when recovered. He may, by sec. 96 Rev. Stat. 1879, bring an action for all wrongs done to the property, rights or interests of the deceased against the wrong-doer. Section 97 provides: "The preceding section shall not extend * * * to action on the case for injuries * * * to the person of the testator, or intestate of any executor or administrator."

For fear that sec. 96 might be construed to confer upon the administrator a right to sue for injuries to the person of the intestate, the next, as will be seen, declares in express terms that he

shall not do so. To sustain this action we must say, he may maintain such actions, and that, too, because of a statute of another State. In short, we must convert him into a trustee for the purposes entirely foreign to any duty devolved upon him as administrator by the laws of this State. This we cannot do. We understand a general law of the State of Kansas, permits foreign administrators to sue and be sued in the courts of that State, and that he may there prosecute a suit under this damage act, if the law of the State from which he gets his appointment gives him like power. *R. Co. v. Cutler*, 16 Kas. 568. But if the law of the State where the appointment is made prohibits him from prosecuting an action for damages occasioned by the wrongful act of another, and resulting in death, then he cannot maintain the suit in the courts of that State.

This appears to be the result of a recent decision, a statement of which is given in the *Kansas Law Journal* of February 14, 1885.

Most courts and text-writers of acknowledged authority, hold that these actions given by statute, for causing death by neglect, default, or a wrongful act, can only be enforced by the courts of the jurisdiction where the wrong is suffered and the right of action is given. Other courts treat such actions as transitory, and enforce the statute law of the State where the injury was suffered, though the action be not one of any general recognized right.

Others again entertain such actions when the laws of the two States upon the same subject are similar. If the statutes are administered outside of the jurisdiction where enacted, it must be done on principles of comity.

Such principles are not to be narrowed, but they do not justify the courts in going to the extent to which we must go to sustain this action, *i. e.*, to say to an administrator, you may sue in the courts of the State of your appointment under the law of another State when denied the right to bring the same, or a like suit by the laws of the State conferring the appointment.

Judgment of the trial court is reversed.
The other judges concur.

DELIVERY OF GOODS IN EXCESS OF QUANTITY PURCHASED — RIGHTS AND OBLIGATIONS OF VENDEE.

LANDESMANN v. GUMMERSELL.

St. Louis Court of Appeals, Feb. 24, 1885.

1. *Vendee not Obligated to Accept any Portion.*—Where the seller, in filling an order, sends more goods than the buyer has ordered, the latter is under no legal obligation to accept any part of the goods.

2. *Is Merely a Mandatory.* The buyer in such event is under no legal obligation to return the goods at his own expense to the seller, but his duties are simply those of a mandatory.

3. *Return of Goods to Erroneous Address—Measure of Damages.*—Where in such a case the buyer undertakes to return the goods, and by mistake sends them to a wrong address, so that they do not reach the seller until a lapse of considerable time, and by a circuitous route, the buyer becomes responsible to the seller as for misfeasance of a voluntary bailment, but the seller's measure of damages is confined to the amount necessarily lost by him owing to such misfeasance.

4. *Not Responsible for Value of Goods.*—It is error, under such circumstances, to instruct the jury that it was the buyer's duty to return the goods at his own expense, and that if he failed to do so, the seller is entitled to recover from him the value of the goods.

Appeal from the Circuit Court of the City of St. Louis.

G. M. Stewart, for plaintiff; *L. R. Tatum*, for defendant.

ROMBAUER, J., delivered the opinion of the court:

When the seller in filling an order sends more goods than the buyer has ordered, the buyer is under no legal obligation to accept any part of the goods. *Rommel v. Wingate*, 103 Mass. 327, 330; *Levy v. Green*, 28 Law Jour. Ex. Ch. p. 319; *Downer v. Thompson*, 2 Hill, 137. This seems to be settled law, and was recognized as such by the trial court in this cause in its instruction to the jury. But we are referred to no cases which hold, that under such circumstances, it is the duty of the buyer to return the goods to the seller, if by return a re-delivery of the goods to the seller, wherever he may be found, is meant. The current of authority is to the contrary. *Lucy v. Monflet*, 5 Hurl. & Nor. 233; *Grimoldby v. Wells*, 10 C. P. Law Rep. 391. In the latter case Lord Coleridge pointedly says: "Why should he" (the seller) "be entitled to impose upon the purchaser, who never bargained for such goods, and who has a right to reject them, the burden of sending them back, possibly for a considerable distance and at a considerable expense. No authority, as it seems to me, can be cited for such a proposition, and the reason and justice are against it."

In the case now before us, goods in excess of those ordered were sent by the plaintiffs, sellers, from Cleveland, Ohio, to the defendants, buyers, in St. Louis, Missouri. There was evidence tending to show that the defendants refused to accept the goods, and immediately notified plaintiffs to that effect. That the defendants might have stopped there, stored the goods as bailees for plaintiff, and could have successfully defended a suit for their value or contract price, seems to be conceded. *Culiffe v. Harrison*, 6 Excheq. 901; *Levy v. Green*, *supra*; *Rommel v. Wingate*, *supra*. They, however, went further, and attempted to return the goods, and by mistake first sent them to New York by express, and upon becoming aware of their mistake, after a lapse of several months, ordered them to be forwarded by express from New York to Cleveland, Ohio, to plaintiffs. The goods were

tendered to plaintiffs in Cleveland by the express company, but plaintiffs refused to receive them, basing their refusal on the lapse of time between shipment and return, and on the further fact that the express company as a condition precedent to the delivery of the goods demanded of them, the express charges thereon from St. Louis to New York, and New York to Cleveland. This being the testimony the court erred in instructing the jury:

1. The court instructs the jury that it was the duty of defendants to have returned to plaintiffs the goods sued for in this action, in a reasonable time, and by the ordinary route from St. Louis to Cleveland, Ohio; and if the jury believe from the evidence that defendants did not return said goods to plaintiffs within a reasonable time and by the ordinary route, they will find for plaintiffs the full value of said goods, with interest from the time demand was made for payment to the present time, at six per cent. per annum.

No such duty devolved on defendants under the facts proven, nor did the value of the goods and interest constitute plaintiff's measure of damages.

The evidence left the defendants in the position of mandataries, who at worst were guilty of misfeasance in executing a voluntary bailment. They could not be held for the value of the goods as buyers, because the evidence was clear that they had never accepted them. Nor could they be held for the value of the goods as tort-feasors upon the theory of conversion, because neither an actual conversion nor a total loss of the goods by their negligence was shown. *Ross v. Clark*, 27 Mo. 550.

The plaintiff's damages, if they are entitled to recover under the testimony are to be measured by the amount which they necessarily lost by defendants' negligent execution of a voluntary bailment. Judgment reversed and cause remanded. All the judges concur.

WEEKLY DIGEST OF RECENT CASES.

| | |
|-------------|--|
| CALIFORNIA, | 4, 5, 8, 9, 10, 15, 20, 30 |
| MONTANA, | 1, 2, 3, 6, 16, 26, 27, 34 |
| NEBRASKA, | 7, 17, 18, 22, 23, 24, 25, 37, 38, 39 |
| NEVADA, | 40, 41, 42, 43 |
| OREGON, | 33 |
| WISCONSIN, | 11, 12, 13, 14, 19, 21, 28, 29, 31, 32, 35, 36 |

1. ATTACHMENT.—*Sufficiency of Bond*.—An undertaking in attachment in which the sureties contract to answer for the wrongful suing out of the attachment, is not a sufficient compliance with a statute requiring such undertaking to be conditioned for the payment of all damages that the defendant may sustain, if it is finally decided that the plaintiff was not entitled to the attachment. *Pierce v. Miles*, S. C. Mont., Jan. 30, 1885; 6 W. C. Rep. 94.

2^d ——. *Need not be Sent by Principal—When Amendable*.—An undertaking in attachment need not be signed by the plaintiff. The statute is com-

plied with if two sufficient sureties sign the undertaking on behalf of the plaintiff. If such undertaking is defective, a new one may be filed without prejudice to the rights of the attaching creditor. *Ibid*.

3. CHATTEL MORTGAGE.—*Mortgagee when Cannot Maintain Claim and Delivery*.—A mortgagee of personal property cannot maintain an action of claim and delivery to recover possession of the same from a third person, when the mortgage provides that the mortgagor shall retain possession of the property mortgaged. *Laubenheimer v. McDermott*, S. C. Mont., Jan. 29, 1885, W. C. Rep. 80.

4. CHINESE RESTRICTION ACTS.—*Merchant Temporarily Departing*.—A Chinese merchant, residing and doing business in the United States, who temporarily departed therefrom before the passage of the Chinese restriction act, is entitled to re-enter the same without producing the certificate required by section six of the act of 1882, as amended in 1884. *In re Ah Ping*, Cir. Ct. Cal., March 30, 1885, 6 W. C. Rep. 59.

5. ——. *Restriction Acts how Construed*.—The acts of Congress commonly called the Chinese restriction acts, should be so construed, if possible, as not to bring them into conflict with stipulations in the treaties between the United States and China. *Ibid*.

6. CLAIM AND DELIVERY.—*Return of Property—Findings*.—In an action of claim and delivery of personal property, where there is an issue as to the title and right of possession, and a finding in favor of the defendant, a judgment for the return of the property follows as a matter of course, even if the complaint does not contain a formal prayer for the return thereof. In such case, a finding that, at the commencement of the action, the property was delivered to the plaintiff, is immaterial. *Lavelle v. Lavery*, S. C. Mont., Jan. 10, 1885; 6 W. C. Rep. 73.

7. CONSTITUTIONAL LAW.—*Jury Fees in Criminal Cases*.—The Constitution does not deprive the legislature of the authority to impose a reasonable jury fee to be taxed as a part of the costs against a person convicted of an offense. *Shaw v. State*, S. C. Neb., March 17, 1885; 22 N. W. Rep. 772.

8. CONVERSION.—*Demand, when Waived—Refusal to Deliver*.—In an action to recover personal property, where a demand is necessary to fix the liability of the defendant, proof of any circumstance which would satisfy a jury that a demand would be unavailing, as a refusal by the defendant to listen to one, or a statement in advance that he will not deliver, will be sufficient to excuse proof of a demand. If there is proof that the defendant converted the property, before or independent of the demand, such conversion will render him liable. *Wood v. McDonald*, S. C. Cal., March 31, 1885, 6 W. C. Rep. 128.

9. ——. *Admission in Answer*.—Where the answer in such action, after averring that the plaintiff did not demand possession of the property before the commencement of the action, alleges that the defendant "would have refused to deliver the possession of the property if demand had been made for the same," no proof of demand is necessary. *Ibid*.

10. ——. *Insolvency Discharge no Defense*.—A discharge in insolvency is no defense to an action to recover the possession of personal property of the plaintiff, converted by the insolvent. *Ibid*.

11. CORPORATION—*Action by Stockholder to Cancel Unlawful Issue of Stock.*—A court of equity has jurisdiction of an action brought by a stockholder against a corporation to procure the cancellation of certain stock alleged to have been issued by its board of directors without lawful authority, and incidentally to obtain an injunction to restrain the holders of such stock from voting thereon at the meetings of the corporation. *Wood v. Union Gospel Church Building Assn.*, S. C. Wis., March 31, 1885; 22 N. W. Rep. 756.
12. ———. *Complaint.*—*Rev. St. Wis.* 1878, §§ 1772, 1774, 1753.—A complaint in such an action that alleges that the stock was issued with a view to increase the capital stock, and was unlawfully issued, because "no copy of any amendment to the original articles of incorporation had been certified to and filed in the office of the register of deeds of the county in which such corporation was organized," and because none of the persons to whom it was issued paid any consideration therefor, sufficiently avers that such stock was unlawfully issued. *Ibid.*
13. ———. *Directors as Parties Defendant.*—The directors of a corporation are not necessary parties to such an action. *Ibid.*
14. COUNTER-CLAIM.—*Equitable Action—Former Judgment—Damage to Defendant.*—In an equitable action to restrain defendants from obstructing a flow of water to which plaintiff claims to be entitled, and for damages caused by such obstruction, defendant cannot set up as a counter-claim that the rights of the parties had been settled by a judgment rendered by a circuit court, fixing the amount of water to which plaintiff was entitled, and that plaintiff had violated the rights of defendant by drawing more water than he was entitled to, to the damage of defendant to the amount of \$15,000, for which he demanded judgment. *Mulberger v. Koenig*, S. C. Wis., March 31, 1885; 22 N. W. Rep. 745.
15. EJECTMENT.—*Deed Absolute in form as Mortgage—Form of Judgment.*—Where, in an action of ejectment on a deed absolute in form, the answer sets up, and the court finds, that such deed was in effect a mortgage, given by the defendant as security for a debt due plaintiff, the judgment should provide that in case of the non-payment of the mortgage debt by defendant, within a time fixed, the property should be sold, and the proceeds applied to the payment thereof. *Healy v. O'Brien*, S. C. Cal., March 19, 1885; 6 Pac. Rep. 386.
16. ESTATE OF DECEDENT.—*Claims for Services Performed for Benefit of Estate, how Enforced.*—Services performed for the benefit of an estate, at the request of the executor thereof, and subsequent to the death of the testator, are included within the expenses of administration, and are not "claims" against the estate within the meaning of such sections. The probate court has exclusive jurisdiction to pass upon the demand for such services, and the same cannot be set up as a counter-claim to an action by the executor. *Dobson v. Nevitt*, S. C. Mont., Jan. 29, 1885; 6 W. C. Rep. 83. See also 6 Pac. Rep. 358.
17. FRAUDULENT CONVEYANCES.—*Evidence of Intent.*—Where there are fraudulent transfers of property to prevent the collection of debts, it is the duty of the court to ascertain, if possible, the time and manner of the creation of the several debts, in order to determine whether the transfers were made after the debts were incurred, or with an intention to create debts. *Clemens v. Brillhart*, S. C. Neb., March 24, 1885; 22 N. W. Rep. 779.
18. HOMESTEAD.—*Excusable Absence.*—A head of a family without a homestead, purchasing a piece of property within the homestead limit as to quantity and value, with the *bona fide* purpose and intention of residing thereon as a permanent homestead, but who is temporarily prevented from occupying the same by reason of the unexpired term of a tenant thereon, existing at the time of such purchase, or other transient cause, and who does enter and reside upon the same within a reasonable time, and without unnecessary delay, and continue to reside thereon, will take the same free of the lien of a judgment existing at the time of such purchase, or which may be rendered previous to the actual occupancy or residing on such homestead. *Hanlon v. Pollard*, S. C. Neb., Filed March 17, 1885; 22 N. W. Rep. 767.
19. INSURANCE.—*House Destroyed by Tornado—Lightning—Instruction as to Credibility and Weight of Expert Testimony.*—The question as to the presence or absence of lightning as an agency in the destruction of the property, for the loss of which this action was brought, being a question of fact for the jury, to be determined by expert testimony principally, the instructions of the court that although the preponderance of the evidence is not always determined by the number of witnesses, still, in a case where a question is to be determined by the testimony of men of great scientific attainments, other things being equal, the greater number would carry greater weight, but that it was the province of the jury to give such weight to the testimony of the experts, when viewed in connection with all the other evidence in the case, as they should think and believe it should receive, was not erroneous. *Spensley v. Lancashire Ins. Co.*, S. C. Wis. March 3, 1885; 22 N. W. Rep. 740.
20. LARCENY.—*Stolen Property—Possession as Evidence.*—In a prosecution for larceny, the possession by the accused of recently stolen property is not sufficient in itself to justify a conviction, but is a circumstance to be considered, with other evidence, in determining the guilt or innocence of the person charged. *People v. Fagin*, S. C. Cal. March 21, 1885; 6 Pac. Rep. 394.
21. LIBEL.—*Criticising Management of Case by Physician—Publication, when Actionable Per Se.*—Where the words employed in a publication in a newspaper, in stating the conduct of a physician in a particular case, only impute to him such ignorance or want of skill as is compatible with the ordinary or general knowledge or skill in the same profession, they are not actionable *per se*. But where the words so employed, in detailing the action of the physician in a particular case, taken together, are such as fairly impute to him gross ignorance and unskillfulness in such matters as men of ordinary knowledge and skill in the profession should know and do, then they necessarily tend to bring such physician into public hatred, ridicule or professional disrepute, and hence are actionable *per se*. Publication held libelous *per se*. *Ganvrau v. Superior Publishing Co.*, S. C. Wis. March 3, 1885; 22 N. W. Rep. 726.
22. MARRIED WOMEN'S PROPERTY.—*Reduction to Possession—Husband as Agent.*—At common law, in order to constitute a reduction of the personal

- property of the wife to the possession of the husband so as to vest the title to the property in him, the act and the intent to so hold the property must exist. The mere receiving of the money of the wife as agent or trustee, with the purpose of investing it in real estate in the name of the wife, would not be such reduction if the investment were made prior to the existence of the indebtedness, to the satisfaction of which the property is sought to be appropriated. *Edgerly v. Gregory*, S. C. Neb., March 24, 1885; 22 N. W. Rep. 775.
23. —. *Liability for Debts*.—Real estate, purchased with money inherited by the wife from the estate of her father and placed in the hands of the husband as agent or trustee, for the purpose of having it invested in real estate in the name of and for the wife, will not be held liable for the separate debts of the husband where the money was invested in such real estate after the passage of the act of 1871 relative to the rights of married women, and before the existence of the indebtedness of the husband for the satisfaction of which the property is sought to be applied. *Ibid*.
24. MORTGAGE FORECLOSURE—*Payment to Beneficiary after Confirmation*.—Where, after the foreclosure of a mortgage, and a sale of the mortgaged premises to the beneficiaries under the decree, and the confirmation of the sale, the mortgagor satisfies the decree, the money so received by the beneficiaries will avoid the sale and confirmation. *Applegate v. Kingman*, S. C. Neb. March 17, 1885; 22 N. W. Rep. 768.
25. —. *Notice before Procuring Sheriff's Deed*.—Where a long period of time elapses between the confirmation of a sale and the execution of the sheriff's deed, the debtor should be notified of the application for an order requiring the then sheriff to execute a deed to the purchaser. *Ibid*.
26. NORTHERN PACIFIC R. R. CO.—*Grant of Right of Way is Absolute*.—The grant to the Northern Pacific Railroad Company of the right of way through the public lands, two hundred feet on each side of its track, is present and absolute, and subject to no conditions, except those necessarily implied, such as that the road shall be constructed and used for the purpose designed. *Wilkinson v. Railroad Co.*, S. C. Mont. Jan. 29, 1885; 6 W. C. Rep. 90.
27. —. *Grant Attaches to Mineral Lands—Priority of Grant*.—The proviso in section 8 of the act incorporating such railroad, excepting mineral lands from the alternate sections of land granted to aid in the construction thereof, does not refer to the grant of the right of way contained in section 2. Such right of way may extend over and cover mineral lands of the United States. If at the time the right of way attaches such mineral lands are unoccupied, a subsequent location thereof, followed by a patent to the locators, is inferior to the right of way to the company, and must yield to the superior legal title, without a resort to a court of equity to set the patent aside. *Ibid*.
28. PARENT AND CHILD—*Null Marriages—Legitimacy*—*Rev. St. Wis. 1878, §§ 2270, 2330, 2349*.—A child born within the wedlock of a regular marriage, which is null in law because the woman has another husband living from whom she has never been divorced, is nevertheless the legitimate child and heir of each and both parents, to all intents and purposes.—*Watts v. Owens*, S. C. Wis., Mar. 3, 1885; 22 N. W. Rep., 720.
29. —. *Presumption as to Legitimacy*.—To bastardize and disinherit a child born in lawful wedlock the most clear and conclusive evidence of non-access of the husband is required. Declarations of the husband held insufficient to overcome presumption of legitimacy; following *Mink v. State*, 60 Wis., 583; s. c. 19 N. W. Rep., 445.—*Ibid*.
30. PARTNERSHIP ACCOUNTING—*Intervention—Joinder of Parties*.—In an action by one partner against another for an accounting, all of the creditors of the partnership may join in an intervention, without a separate application by each, for the purpose of reaching partnership property fraudulently disposed of by the defendant.—*Grosini v. Perazzo*, S. C. Cal., March 31, 1885; 6 W. C. Rep., 127.
31. PRINCIPAL AND SURETY—*Liability of Sureties on Bond—Recital of Contract*.—Where, by the express language of a bond, the guaranty only extends to goods consigned to the principal therein named, as per terms of a written contract referred to therein which forbids any shipments in excess of a certain amount before returns of all previous shipments have been made, there can be no liability on the part of the sureties for shipments made in violation of the contract thus imported into the bond by way of recital.—*W. W. Kimball Co. v. Baker*, S. C. Wis., March 3, 1885; 22 N. W. Rep., 730.
32. REPLEVIN.—*New Party Defendant—Rev. Stat. Wis. 1878, § 2610—Wife as Party*.—C brought an action against G to replevy a buggy and other property. G claimed to hold the property as bailee or custodian of C's wife. The wife made application to be made a party defendant, claiming that the property was her property, that C had no interest therein, and that he claimed adversely to her. Held, that she could be made a party to the suit. *Carney v. Gleissner*, S. C. Wis., March 3, 1885; 22 N. W. Rep. 735.
33. SPECIFIC PERFORMANCE OF PAROL CONTRACT FOR SALE OF LAND.—*Principles which Govern*.—A parol agreement for the sale of lands will not be specifically enforced unless it contains all the elements of a binding obligation, necessary to the enforcement of any contract, except the written memorandum required by the statute. Such contract, to be specifically enforced, must be clear, certain, definite, just, reasonable and mutual in all its parts, and if it be wanting in any of these essentials, it cannot be enforced. Nor is it sufficient that a specific contract be alleged, it must be clearly and satisfactorily proved, substantially as alleged, in order to take it out of the statute by part performance. In such case the burden of proof is on the one seeking the specific performance. *Wagonblast v. Whitney*, S. C. Ore., March 18, 1885; 6 W. C. Rep. 103. See also 6 Pac. Rep. 399.
34. —. *Memorandum—Insufficient Description*.—A memorandum for the sale of land described the same as follows: "A piece of ground commencing on the corner of contemplated cross-street, with Main, the cross-street supposed to be Eleventh avenue, said ground running on a line of Main street one hundred feet front on the east, and extending back from Main street one hundred and twenty-five feet to an alley; and also two lots on Ewing street, one hundred feet front on the west side by one hundred and forty-one and one-half feet deep to an alley." Held, that such description was not sufficient to permit

parol evidence to be introduced to identify it with the land intended to be conveyed, and that a specific performance of the contract should be refused. *Ryan v. Davis*, S. C. Mont., Jan. 13, 1885; 6 W. C. Rep. 77.

35. **TAXATION—Assessment Roll not Verified—Injunction—Complaint.**—The allegation in a complaint that the assessment rolls were not verified by the assessors who made the same, is not equivalent to an allegation that the taxes levied upon the lands of plaintiff are not only illegal, but unequal and unjust, and that a court of equity should therefore restrain their collection. *Fifield v. Marinette Co.*, S. C. Wis., March 3, 1885; 22 N. W. Rep. 705.

36. — **Injustice and Inequality—Tender of Taxes Justly Due.**—A complaint which does not allege in direct terms the injustice and inequality of a tax assessed on plaintiff's lands, and further allege a state of facts which, if proved on the trial, would establish the truth of the general allegation of its injustice, does not state facts sufficient to constitute a cause of action for equitable relief, unless there be a further allegation of an offer to pay the taxes justly chargeable to the property of the plaintiff on account of which he seeks relief. *Ibid.*

37. **VENDOR AND VENDEE—Tender of Deed.**—Where the vendee of real estate refuses to perform the contract on his part, and an action is brought to recover damages for the breach, no tender of a deed for the property is necessary before bringing the action. The rule is different, however, where the action is to recover the contract price. *Wasson v. Palmer*, S. C. Neb., March 18, 1885; 22 N. W. Rep. 773.

38. — **Measure of Damages.**—In an action by the vendor to recover from the vendee damages for a failure on his part to perform the contract, the measure of damages is the difference between the agreed price and the market value of the property at the time of the breach. *Ibid.*

39. **VOID TAX SALE—Purchaser—Subrogation.**—Where a purchaser at a void sale of real estate for taxes pays the taxes legally levied upon the real estate for subsequent years, upon a failure of his title he will be subrogated to the rights of the county to the extent of the legal taxes so paid by him, with legal interest, even though the taxes upon which the sale was had were void by reason of the default of the assessor in not filing the proper oath with the assessment roll. *Merriam v. Hemple*, S. C. Neb., March 17, 1885; 22 N. W. Rep. 775.

40. **WATER RIGHTS—Easement to Overflow Adjoining Land—Irrigation.**—Where two tracts of land are adjacent, and one is lower than the other, the owner of an upper tract has an easement in the lower land to the extent of the water naturally flowing from the upper land to, and upon, the lower tract, and any damage that may be occasioned to the lower land thereby, is *damnum absque injuria*. But such easement does not exist as to water which the upper proprietor conducts, by artificial means, to, and upon his own land, for purposes of irrigation, and suffers to flow onto the land of the lower proprietor. *Boynton v. Langley*, S. C. Nev. March 27, 1885; 6 W. C. Rep. 98.

41. — **Acquiescence in Flow of Limited Quantity.**—A mere acquiescence, or permission, on the

part of the lower proprietor, to allow the water, so conducted, to flow in such limited quantity as did his land no injury, cannot give the upper proprietor a prescriptive right to increase the flow to such an extent as to damage the lower land. *Ibid.*

42. — **Prescription—Enlargement of Use.**—The right gained by prescription to overflow the land of an adjoining lower proprietor, is confined to the right as exercised for the full period of time required by the statute, which is, in this State, for five years. A party claiming such prescriptive right for five years, who, within that time, enlarges the use, cannot, at the end of that time, claim the use, as enlarged, within that period. *Ibid.*

43. — **Denial of Right to Overflow.**—Such prescriptive right cannot be presumed to have been acquired, if the lower proprietor, at any time within the statutory period of five years, remonstrated with, and denied the right of the upper proprietor to flow such water over his lands to an extent sufficient to damage the same. *Ibid.*

CORRESPONDENCE.

"WAR LITERATURE."

To the Editor of the Central Law Journal:

Your most excellent law journal is entirely too valuable to our profession as to permit it to risk its reputation on the field of "War Literature." I was one of Gen. Prentiss' Brigade at the battle of Shiloh, and know that we (the extreme front), were not in camp nor in our tents, but were in line of battle at least thirty minutes before the advance of the Confederate Army came in sight. Our pickets had given the alarm at dawn of the day, and we (Prentiss' Brigade) were marched out upon an open field awaiting the enemy. We did not hold our first position very long, then retreated, and our second stand was at our camp, some 800 or 1,000 yards from first stand or position, and quite a number of our men were killed at this second position. We retreated once more to a position still further in our rear, and then took possession of a partly washed out country road, and then repelled attack after attack till after four o'clock p. m. It was five o'clock p. m. when we surrendered. There are a number of Prentiss' Brigade still living in this neighborhood who will verify by their oath the correctness of this statement. Please note it.

I am your most obedient servant,

LOUIS BENECKE,
Formerly of Co. H. 18th Mo.

REMARKS.—You risk your own reputation as a historian in endeavoring to spoil ours. Gen. Prentiss commanded a division; not a brigade. Many of them were in bed when the first attack on their pickets began. Most of them ran away early in the morning, though some of them did not. The regiments which were surrounded, and which surrendered with Prentiss at 5 o'clock in the afternoon, did not belong to his own division. They were regiments which he had picked up during the day, and with which he had stubbornly contested a portion of the field. They were the 8th, 12th, 14th and a fragment of the 3d Iowa, and the 58th Illinois.—[ED.]

QUERIES AND ANSWERS.

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

25. Deed to G of 200 acres of land, "to have and to hold the said tract of land unto him, the said G, his heirs and assigns forever, in trust for and to the uses, intents and purposes hereinafter mentioned, that is to say, that the said 200 acres of land, and every part and parcel thereof, with all and singular the appurtenances thereunto belonging or in anywise thereunto appertaining in trust, for the use of Jane Davidson, until the said Jane shall arrive to the age of twenty-one years, or for the use of the heirs of her body legally begotten, and in case the said Jane shall die without heir as aforesaid, or before she arrive at the age above stipulated, then the said trust is to continue in the said G, his heirs and assigns for the use and benefit of Hannah (Jane's sister) and the heirs of her body legally begotten, forever." Jane lived to be twenty-one, and died leaving several children. Do her children take any interest in the land under this deed and what?

Elizabethtown, Ky.

H.

26. The courts have decided that "no boundary fence can be made of barbed wire, without the consent of the parties owning the adjacent land, and any man who puts a barbed wire fence along the highway, renders himself liable for all injuries resulting to stock passing said highway." Can you refer me to the court, and report of such decision? If not please submit the inquiry to the readers of the JOURNAL. The question is an important one, both to the profession and the public, since such fences have been so extensively built. An answer giving the desired information will be greatly appreciated by

A SUBSCRIBER.

RECENT PUBLICATIONS.

CORD ON MARRIED WOMEN.—A Treatise on the Legal and Equitable Rights of Married Women, as well in Respect to their Property and Persons as to their Children. In two volumes. Philadelphia: Kay & Brother. 1885.

This is a very great advance upon the first edition, which was published many years ago. It cites nearly ten times as many cases as that edition, and draws into its discussions many new topics. Many of these topics seem to us not to relate to the subject in hand, and we regret that the author had not employed his space in searching out the law, even more than he has, on many disputed questions relating to the immediate subject of his work. The author's propositions are in general plainly stated, though here and there crude expressions and unscientific work may be detected. No subject presents greater difficulties to the judge or practitioner than the subject of these volumes. The law relating to the property rights and to the contractual disabilities of married women is undergoing rapid changes. We have cut loose from the old rules, and on many questions we do not know where we stand. We have no doubt that this work will be welcomed by the profession. It has been handsomely brought out by its publishers.

JETSAM AND FLOTSAM.

TOO BUSY.—Mr. J. W. Donovan writes that he has sold his book, "Tact in Court," to his publishers for \$2,500, and that he is going to make no more books, being too busy.

MR. CONKLING AND HIS LATIN PUN.—Roscoe Conkling has not been in court very frequently of late, which in one sense is a pity. For however greatly opinions as to his legal abilities may differ, there is no doubt of his ability to entertain the court, counsel and spectators. He does not confine himself to witticisms in his native tongue, but will even encroach upon the sacred precincts of the ancient languages. I once heard him make a Latin pun, which has not yet, that I am aware of, found its way into print. During the taking of some testimony he had been indulging in several Latin phrases, when in some way one of the counsel was led to remark, "What's sauce for the goose is sauce for the gander;" he added: "The Senator cannot translate that, because he does not know the Latin for sauce." Not know the Latin for sauce!! exclaimed Mr. Conkling; "why, it's mentioned twice in half a line of Virgil—'gravi jampridem saucia cura.'"—Gustav Kobbe, in the Albany Law Journal.

A CONTRACT AN ACTOR CAN'T BREAK.—The other day I came in upon a theatrical manager as he was writing the following advertisement: "Wanted—A lawyer who can draw up a contract between a manager and an actor which the latter can't break." When I asked him in what paper he intended to insert it, he said: "It's a gag for the new burlesque I'm going to bring out. You don't suppose I'd advertise for such a contract. Why, it would be money thrown away. There's no such thing as a contract an actor can't break; at least not in this world. I never knew a contract yet that was proof against a case of big head." A case of big head arises when an actor who makes a success in a small part immediately considers himself entitled to all the privileges of a star.—Gustav Kobbe, in the Albany Law Journal.

THE WEAK SISTER.—One of our judges is known among the younger members of the profession as "the weak sister," because he is more frequently reversed than any other judge of his court. The other day I was discussing with a friend of mine, a motion which he was to argue the next morning before "the weak sister." "There's only one disadvantage under which our side will have to labor," he said, "but it's a great disadvantage." "What's that?" I asked. "We're in the right?" And he was beaten.—Gustav Kobbe in the Albany Law Journal.

SHAKSPEARE'S REPORTS.—Lord Bramwell recently, in giving judgment in an important Scotch law-suit, took occasion to review briefly the celebrated case of Shylock v. Antonio (Shakspeare's Reports), and said: "I am quite certain that I would have decided that case in the way fair Portia did; not, perhaps, upon all the same reasons, but upon some of them. As a matter of fact, Shylock never had the pound of flesh which could be called his—it had never been appropriated to him; and he could only get it by a considerable crime, no less than murder. But if the pound of flesh had been appropriated to him, I should have given the pound of flesh to Shylock."—Ex.

EARL CAIRNS.—Lady Cairns's announcement written on a half-sheet of note paper and affixed to the outer gate of Lindisfarne, which informed the inhabitants of Bournemouth somewhat abruptly that Lord Cairns had "entered into rest at 6-45" on Thursday morning, took everybody by surprise. He had taken horse ex-

ercise only three days before, and was walking about the cliffs on Tuesday. His health had for some time caused his friends considerable anxiety and he had been for the past month under the care of Mr. Nankivell, a local homoeopathic practitioner. On Wednesday, Dr. Kidd was summoned by telegraph, but Lord Cairns was already sinking. The ex-Lord Chancellor will be much missed at Bournemouth. It is somewhat remarkable that both the Conservative and the Liberal Lord Chancellors should have devoted themselves in private so energetically to church work. Like Lord Selborne, Lord Cairns was an indefatigable Sunday-school teacher; regularly, when at Bournemouth, presiding over the Bible class in connection with Holy Trinity Church, the young men crowding to his teaching. He was also a popular president at missionary society and other religious gatherings, and he cordially sympathized with the evangelistic work of his son-in-law, the Hon. and Rev. Neville Sherbrooke. He was also a firm supporter of the Rev. Canon Eliot, Vicar of Holy Trinity, the Evangelical Church of Bournemouth, a place of worship which had, one Sunday during the regime of the late Government, the singular distinction to include four Cabinet Ministers in its congregation. — *The World* (London).

METAPHORICALLY KICKING.—The women of Wyoming are, metaphorically, kicking, and kicking high, against woman suffrage. The right to vote has entailed upon the women the duty of jurors; and many, recently, having been summoned away from their home duties and babies, to sit for days on juries in the mephitic atmosphere of court and jury rooms, are anxious to see themselves deprived of the privilege of voting, which they do not care much about exercising. — *Kansas City Journal*.

ONLY AN EDITOR.—The daughter of a New York millionaire has applied for a divorce on the ground that her husband basely deceived her. He assured her that he was a coachman, but since marrying him she has discovered that he is only an editor. We didn't suppose there was such a brand of heartless villainy abroad in the land. — *Kentucky Yeoman*.

JUSTICE WYLIE WISHES TO RETIRE.—A recent press dispatch says "Justice Andrew Wylie, of the Supreme Court of the District of Columbia, called upon the President a few days ago, and informed him that he desired to resign from the bench and go upon the Judiciary retired list at as early a period as might suit the President's convenience to select a successor. It is understood that Mr. Cleveland requested the judge to delay the tender of his resignation until ample opportunity shall have been afforded to find the right man to fill the prospective vacancy. Justice Wylie is now seventy-one years of age, and has entered upon the twenty-third year of service as a member of this court. He is still in vigorous mental and physical condition, but instead of indefinitely remaining on the bench prefers at this time to embrace his privilege of retiring on full pay in order to give attention to his private interests."

A VERY QUEER FELLOW.—Judge Thomas J. Mackey, of South Carolina, who has been acting as counsel for General Hazen before the court martial, is, says *The Philadelphia Record*, a very queer fellow. He is an elderly man, but his hair and mustache are still jet black, and his eyes are as piercing as ever. He is a man of excellent ability and good education, with a most remarkable flow of words. He can talk for three hours without stopping for breath. Senator Morgan, of Alabama, is the only other man in Washington who

can do this. Mackey is a man of excellent family, too, and very proud of it. One of his near relatives was the late Dr. Marion Sims, of New York, whose memoirs Judge Mackey is compiling. Unlike most of the Southern 'Judges,' the old gentleman has a right to his title. They make judges out of all sorts of material South as well as North. Mackey was a very good judge, by the way."

RAILROAD PASSES.—The railroads are now giving passes quite liberally. Two of them yesterday gave all their stockholders a pass on their dividends—good for six months. *Boston Advertiser*.

THE EFFECT OF CUMULATIVE PENALTIES.—The cumulative penalties prescribed by the "Habitual Criminals' Act" of Illinois for the punishment of criminals convicted twice or oftener, are said to be causing the professional malefactors infinite disgust, and they are generally leaving the State. The twenty year incarceration is a little too too. — *Louisville Courier-Journal*.

OLD FASHIONED BOOKS AND FEES.—The sale of Charles O'Connor's library only realized \$7,000 or \$8,000. Probably the books cost five times the amount. But they were old-fashioned. There are new fashions in law, it seems, as in spring bonnets. By-the-by, I hear that the largest fee Charles O'Connor ever received was his last. It was paid him by Referee Ruggles, on the partition and sale of the Jumel estate, and amounted to a clean cash \$100,000. It came out of Nelson Chase's one-half of that estate. The other one-half of that estate goes to the French heirs, who were represented by Marquis de Chambrun and the late Levi S. Chatfield. — *Ex-Senator Creamer in the Citizen*.

FLOTSAM.

Blow from the cloud land, fanning gales,
And fill the slow and tardy sails,
That from a far-off, mystic sea,
Shall bring my ship safe home to me.

Shine fair, O sunny summer skies,
And let no hindering storm arise!
Lest through the angry breakers' roar
She drift upon some unknown shore.

Beyond the dim horizon's line,
No flutter of her white sails shine,
Or swell to catch the passing breeze,
Slow sailing through those misty seas.

So all the many years have gone,
And never has my ship come home;
Perchance her treasure's richest store
Lies buried on an alien shore.

For me, lone watcher on the strand,
She then may never come to land,
But torn by wind, and wave, and storm,
Can gain no sheltering harbor's bourne.

Mayhap some day unto my feet,
The waves may bring a relic sweet
Of all there might have been for me,
Had but my ship come home from sea.

— *Raleigh News and Observer*.